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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-769

THE MORNING TELEGRAPH, a Division of TRIANGLE PUBLICATIONS, Inc.,

Petitioner

vs.

BERTRAM A. POWERS, individually and as President, THOMAS W. KOPEC, individually and as Secretary Treasurer, DAVID CROCKETT, individually and as Vice President, of New York Typographical Union No. 6, International Typographical Union, an unincorporated voluntary association and "JOHN DOE and RICHARD ROE" and all other persons employed by the plaintiff who are members of New York Typographical Union No. 6, International Typographical Union, and the New York Typographical Union No. 6, International Typographical Union,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1971

No.

THE MORNING TELEGRAPH, a Division of TRIANGLE PUBLICATIONS, INC.,

Petitioner,

vs.

BERTRAM A. POWERS, individually and as President, THOMAS W. KOPEC, individually and as Secretary Treasurer, DAVID CROCKETT, individually and as Vice President, of New York Typographical Union No. 6, International Typographical Union, an unincorporated voluntary association and "JOHN DOE and RICHARD ROE" and all other persons employed by the plaintiff who are members of New York Typographical Union No. 6, International Typographical Union, and the New York Typographical Union No. 6, International Typographical Union,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Morning Telegraph, a Division of Triangle Publications, Inc., hereby petitions that a writ of certiorari issue to review the judgment of the United States Court of Ap-

peals for the Second Circuit, entered on October 13, 1971, in *The Morning Telegraph, a Division of Triangle Publications, Inc.* v. *Bertram Powers, et al.*, Docket No. 71-1494 to the extent that it reversed Orders of the United States District Court for the Southern District of New York, entered on March 23, 1971 and April 17, 1971, denying the defendants motions to vacate a temporary restraining order.

I.

OPINIONS IN THE COURTS BELOW

The opinions in the courts below, none of which is as yet officially reported, are as follows:

(i) Opinion of Judge Bonsal in the United States District Court for the Southern District of New York, filed on March 23, 1971, denying defendants' motion to vacate a temporary restraining order granted in the New York State Supreme Court and in effect on defendants' removal of the action to the district court;

(ii) Opinion of Judge Metzner in the district court, filed on April 17, 1971, denying the defendants' second motion to vacate the restraining order;

(iii) Opinion of the Court of Appeals for the Second Circuit, filed on October 13, 1971, reversing the orders of Judges Bonsal and Metzner.

Copies of the above opinions are annexed as appendicies B, C, and D.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) The judgment of the Court of Appeals was entered on October 13, 1971.

(ii) Rehearing was denied on November 5, 1971.

(iii) Jurisdiction in this Court is invoked under 28 U. S. C. § 2154(1).

III.

QUESTION PRESENTED FOR REVIEW

1. Does the Norris-LaGuardia Act bar injunctive relief to enjoin a strike or work stoppage in violation of the no-strike clause of a collective bargaining agreement, where, even in the absence of a mandatory arbitration procedure in the agreement, the union has a forum providing full recourse for the amicable resolution of its jurisdictional claims before the National Labor Relations Board, in conformity with the orderly and peaceful procedures established under the Labor Management Relations Act?

IV.

THE STATUTES INVOLVED

The statutory provisions involved are 29 U. S. C. § 185(a) Section 301 of the Labor Management Relations Act); 29 U. S. C. § 104 (the Norris-LaGuardia Act); 29 U. S. C. § 141 (Section 1 of the Labor Management Relations Act); and 29 U. S. C. § 159(c) (Section 101 of the Labor Management Relations Act).

29 U. S. C. § 185(a) reads as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

29 U. S. C. § 104 reads as follows:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U. S. C. § 141 reads as follows:

"(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the gen-

eral welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

29 U. S. C. 159(c) reads in pertinent part, as follows:

"... (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the

Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. . . ."

V.

STATEMENT OF THE CASE

On October 13, 1971, the Court of Appeals for the Second Circuit reversed orders of Judges Bonsal and Metzner of the Southern District of New York which had refused to dissolve a temporary restraining order enjoining the defendants from engaging in a slow-down or strike in violation of the no-strike clause of their labor agreement.[1] At the same time the Court affirmed the decision of Judge Motley dismissing a further application by the defendants to dissolve the restraining order on the ground that such application was made after the orders of Judges Bonsal and Metzner had been appealed thus ousting the district court's jurisdiction.

The action originated in the Supreme Court of the State of New York, where a temporary restraining order was granted enjoining the defendants' slow down or strike in the composing room of the Morning Telegraph in New York, in violation of the no-strike clause of the collective bargaining agreement in effect between the parties.[2] The defendants removed the action to the United States district court, under 28 U. S. C. § 1441, and moved to dissolve the restraining order before Judge Bonsal on the basis of the Norris-LaGuardia Act's prohibition of injunctive relief in labor disputes. 29 U. S. C. § 104. Judge Bonsal found, on

[1]The Court of Appeals held that Judge Metzner's Order constituted issuance of a preliminary injunction.

[2]The agreement does not expire until July, 1973.

the record before him, that the collective bargaining agreement between the parties contained a no-strike clause and a grievance procedure, within the scope of this Court's holding in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U. S. 235 (1970). Judge Bonsal also found that the defendants had failed to state any grievance and gave them the right to renew the motion to dissolve, if and when they did state a grievance. Instead, the defendants renewed their motion to dissolve before Judge Metzner on the ground that they had not had the hearing within ten days of the original restraining order provided for by F. R. C. P. 65(b), a contention rejected by Judge Metzner and by the Court of Appeals in its decision of October 13, 1971. Following Judge Metzner's decision, the defendants attempted to state a grievance on their third application to dissolve the injunction, before Judge Motley, but there was no hearing on the issue, since Judge Motley held that the already pending appeals from the orders of Judges Bonsal and Metzner had ousted the jurisdiction of the district court. On this issue, the Court of Appeals affirmed Judge Motley.

In reversing Judges Bonsal and Metzner the Second Circuit held that the labor agreement between the parties did not satisfy the requirements of *Boys Markets* because it did not, contrary to Judge Bonsal's finding, contain a comprehensive, mandatory arbitration procedure. The dispute between the parties, presented for the first time by the defendants before Judge Motley, and, therefore, an issue on which Petitioner has had no hearing on the merits, concerned the defendant union's assertion of jurisdiction over a separate plant in Hightstown, New Jersey, already covered by a contract with a different local of the same Union. Petitioner argued in the Court of Appeals that this essentially jurisdictional dispute could be amicably resolved by recourse to the National Labor Relations Board, a procedure which would serve the underlying principles of

Boys Markets just as effectively as mandatory recourse to arbitration. This argument was rejected by the Court of Appeals, which viewed mandatory arbitration as the necessary *quid pro quo* for enforcement of the no-strike clause.

VI.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals raises a recurring question of fundamental importance in the field of national labor relations. Where a union solemnly undertakes not to strike for the term of a collective bargaining agreement enforceable under Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185, does the Norris-LaGuardia Act, 29 U. S. C. § 104, bar issuance of an injunction against such a strike, in the absence of a mandatory arbitration procedure incorporated into the agreement, despite the fact that there is ample recourse for amicable resolution of the dispute before the National Labor Relations Board?

In *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235 (1970), this Court overruled its prior decision in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962), which had held that the anti-injunction provisions of the Norris-LaGuardia Act, 29 U. S. C. § 104, precluded a federal court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement, even though the agreement contained provisions, enforceable under § 301 of the Labor Management Relations Act of 1947, 29 U. S. C. § 185(a), for binding arbitration.

Under *Sinclair*, state court injunctions, available to restrain breaches of no-strike clauses, could be aborted by removal to the federal courts, followed by application of the Norris-LaGuardia prohibitions. In *Boys Markets* the

Court concluded that: "The sanctioning of this practice, however, is wholly inconsistent with our conclusion in *Dowd Box*, that the Congressional purpose embodied in § 301(a) was to *supplement*, and not to encroach upon, the pre-existing jurisdiction of the state courts. It is ironic indeed that the very provision that Congress clearly intended to provide additional remedies for breach of collective-bargaining agreements has been employed to displace previously existing state remedies. We are not at liberty thus to depart from the clearly expressed Congressional policy to the contrary." 398 U. S. at p. 245.

The Court, moreover, said that: ". . . the existing scheme with the injunction remedy technically available in the state courts but rendered inefficaceous by the removal device, assigns to removal proceedings a totally unintended function." 398 U. S. at p. 246.

The Court of Appeals interpreted this Court's decision in *Boys Markets*, as limiting any lifting of the Norris-LaGuardia Act's ban on injunctive relief to the situation where the labor agreement contains, as a quid pro quo, a mandatory arbitration clause, and it is true that there is language in the opinion which may be so construed.

Such construction, however, ignores the plain import of *General Electric Co.* v. *Local 491, International Union of Electrical Workers*, 398 U. S. 436 (1970), in which, despite the admitted absence of an arbitration clause, the court remanded for consideration in light of its decision in *Boys Markets* a case where the Court of Appeals had affirmed denial of injunctive relief to enforce a no-strike clause, on the basis of Norris-LaGuardia.[3] If *Boys Markets* were to be limited to the arbitration context, the remand by this Court in *General Electric* would have been unnecessary and meaningless.

---

[3]The issue became moot and so was not decided in subsequent proceedings in that case. *General Electric Company* v. *Local Union 191*, 443 F. 2d 608 (5th Cir. 1971).

In *Boys Markets* this Court sought to reconcile the policy expressed in Norris-LaGuardia, 29 U. S. C. § 104, with the rights of state courts, and federal courts on removal or otherwise, to enforce the no-strike obligations of collective bargaining agreements under the national labor policy expressed in the Labor Management Relations Act of 1947. 29 U. S. C. § 141 and § 185. Such reconciliation should not stop short at the single situation considered in *Boys Markets,* i.e., where a mandatory arbitration procedure is found to exist. The National labor policy is equally well served by holding unions to their solemnly undertaken obligations not to strike, as long as they have recourse to an appropriate forum for peaceful resolution of their disputes. Such is the situation here, where the National Labor Relations Board is the proper forum for resolution of a jurisdictional dispute (29 U. S. C. § 159(c)) and where such recourse is consistent with the stated purpose of the Labor Management Relations Act "... to provide orderly and peaceful procedures for preventing the interference by either [employees and employers] with the legitimate rights of the other, ..." 29 U. S. C. § 141.

The question has not, since the decision in *Boys Markets* and the remand in the *General Electric* case, been settled with sufficient breadth and clarity to permit informed planning in labor relations, or to eliminate a recurring source of strife. See W. J. Curtin, *Boys Markets and the No-Strike Injunction,* 57 A. B. A. Journal 863, 865-6 (1971). Where the parties have bargained in good faith for labor peace over the period of a collective bargaining agreement, and have expressly included a no-strike clause, it is, indeed, difficult to understand why their agreement should not be honored and enforced, including injunctive relief. This is particularly true where, as held in *Boys Markets,* state courts have concurrent jurisdiction to grant relief, and it is only by reason of removal to the district court that the Norris-

LaGuardia limitation comes into play. The injunction here was, in the first instance, granted in the state court.

VII.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No.

THE MORNING TELEGRAPH, a Division of TRIANGLE PUBLICATIONS, INC.,

Petitioner,

vs.

BERTRAM A. POWERS, individually and as President, THOMAS W. KOPEC, individually and as Secretary Treasurer, DAVID CROCKETT, individually and as Vice President, of New York Typographical Union No. 6 International Typographical Union, an unincorporated voluntary association and "JOHN DOE and RICHARD ROE" and all other persons employed by the plaintiff who are members of New York Typographical Union No. 6, International Typographical Union, and the New York Typographical Union No. 6, International Typographical Union,

Respondents.

APPENDICES TO THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

Order of the Honorable Andrew R. Tyler, Justice of the Supreme Court of the State of New York

At a Special Term Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, 60 Centre Street, Borough of Manhattan, City and State of New York on the 1st day of March, 1971.

Present:

HONORABLE ANDREW R. TYLER,

Justice.

Index No. 04159-1971

THE MORNING TELEGRAPH, a Division of Triangle Publications, Inc.,

Plaintiff,

—against—

BERTRAM A. POWERS, individually and as President, THOMAS W. KOPEC, individually and as Secretary Treasurer, DAVID CROCKETT, individually and as Vice President, of New York Typographical Union No. 6, International Typographical Union, an unincorporated voluntary association and "JOHN DOE and RICHARD ROE" and all other persons employed by the plaintiff who are members of New York Typographical Union No. 6, International Typographical Union, and the New York Typographical Union No. 6, International Typographical Union,

Defendants.

Appendix A

Order of the Honorable Andrew R. Tyler, Justice of the Supreme Court of the State of New York

Upon the summons and complaint herein, verified February 26, 1971, and upon the annexed affidavits of Bernard Purcell, Thomas F. Flood and Frank Mascia sworn to on the 26th day of February, 1971;

Now, on motion of ROYALL, KOEGEL & WELLS and HAROLD E. KOHN and AARON M. FINE, attorneys for plaintiff, it is

ORDERED, that defendants, and each of them, show cause at a Special Term, Part I, of this Court to be held at the County Courthouse, 60 Centre Street, Borough of Manhattan, City and State of New York, on the 3rd day of March, 1971, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered, pending the determination of the issues of this action, staying, enjoining, restraining, and directing where specified, the defendants, and each of them, and their agents, members, servants, employees, managers, associates, confederates, representatives, successors and assigns, and all persons acting under, for or in aid of or in conjunction with said defendants, or any of them, collectively or individually, directly or indirectly, during the pendency of this action and until the final entry of judgment herein:

1. From authorizing, instigating, promoting, encouraging, causing, permitting, sanctioning, carrying on, continuing or lending support or assistance of any nature to any act or omission by defendant's local chapters or members which will in any way,

(a) breach the collective bargaining agreement between plaintiff and defendants dated March 31, 1970,

Appendix A

Order of the Honorable Andrew R. Tyler, Justice of the Supreme Court of the State of New York

(b) interfere with plaintiff in the production and distribution of plaintiff's newspaper,

(c) prevent, hinder or limit any individual from engaging in the performance of his lawful functions and duties on behalf of the plaintiff,

(d) result in any acts aforesaid or any other and different acts which will tend to harm or destroy plaintiff's property or interfere with the conduct of plaintiff's business;

2. From supporting or engaging in any strike or other work stoppage, slow down, withholding of services or other interruption in violation of the provisions of the Agreement between plaintiff and defendants; and

WHY an Order should not be entered affirmatively directing the defendant Union representatives to direct the members of the defendant Union to work in accordance with their regular working schedules, and not to support or engage in any activity which would violate the provisions of the Agreement between the defendant Union and plaintiff in that said members shall not engage in any strike or other work stoppage, slow down, withholding of services or other interruption in violation of such Agreement; and WHY such other and further relief as the Court may deem just and proper should not be granted; and it is further

ORDERED, that pending the hearing and determination of this motion, defendants and each of them be and hereby are temporarily restrained from:

1. Authorizing, instigating, promoting, encouraging, causing, permitting, sanctioning, carrying on, continuing

Appendix A

Order of the Honorable Andrew R. Tyler, Justice of the Supreme Court of the State of New York

or lending support or assistance of any nature to any act or omission by defendant's local chapters or members which will in any way

(a) breach the collective bargaining agreement between plaintiff and defendants dated March 31, 1970,

(b) interfere with plaintiff in the production and distribution of plaintiff's newspaper,

(c) prevent, hinder or limit any individual from engaging in the performance of his lawful functions and duties on behalf of the plaintiff,

(d) result in any acts aforesaid or any other and different acts which will tend to harm or destroy plaintiff's property or interfere with the conduct of plaintiff's business;

2. Supporting or engaging in any strike or other work stoppage, slow down, withholding of services or other interruption in violation of the provisions of the Agreement between plaintiff and defendants; and it is further

ORDERED, that service upon the defendants of a copy of this order to show cause, together with copies of the papers upon which it is granted, on or before o'clock in the forenoon on the 1st day of March, 1971, shall constitute good and sufficient notice and service.

ENTER

s/A R T

.....

Justice of the Supreme Court
of the State of New York

APPENDIX B

Order and Opinion of the District Court (Judge Bonsal)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE MORNING TELEGRAPH, a Division of TRIANGLE PUBLICATIONS, INC.,
Plaintiff,

—against—

BERTRAM A. POWERS, Individually, and as President, et al.,
Defendants.

71 Civ. 949
Motion #57
on 3/9/71

MEMORANDUM

BONSAL, D. J.

On March 1, 1971, on the basis of plaintiff's verified complaint and supporting affidavits, Justice Andrew R. Tyler of the New York Supreme Court, New York County, issued, *ex parte,* a temporary restraining order enjoining a slowdown by members of the defendant, New York Typographical Union No. 6 (the Union), in the composing room of the plaintiff. Thereafter, on March 3, 1971, the defendants removed the action to this court, pursuant to 28 U. S. C. § 1441 on the ground that the action arose under the Labor Management Relations Act, 29 U. S. C. § 141, *et seq.* Defendants now move pursuant to Rule 65(b), F. R. Civ. P., to vacate the temporary restraining order.

Appendix B

Order and Opinion of the District Court (Judge Bonsal)

The plaintiff alleges that on February 25 and 26, 1971, members of the Union caused a slowdown in the plaintiff's composing room. According to the foreman and assistant foreman of the composing room, the Union representative told them that the Union members had slowed down because of a letter which had been sent to Union headquarters—who sent the letter or what it stated is nowhere disclosed.

The plaintiff's complaint alleges that the slowdown breached the no-work stoppage provisions in the collective bargaining agreement between the Union and the plaintiff, and that the slowdown caused the plaintiff irreparable harm. The defendants do not deny that the slowdown occurred or that it caused the plaintiff irreparable harm.

The defendants contend that this court is without power to issue injunctive relief in this action and therefore must vacate the temporary restraining order. This court may only allow the temporary restraining order to remain in effect if it first determines that both parties are contractually bound to arbitrate the dispute in issue. *Boys Market Inc*, v. *Retail Clerks Union, Local 770,* 398 U. S. 235 (1970).

The plaintiff and the Union adopted, with certain modifications, a collective bargaining agreement between the Union and the members of the Publishers Association of New York City. Paragraph 4 of the underlying agreement is titled "Joint Commitment," and it provides:

> "It is the intention and the desire of the parties hereto that no strike or other interruption of normal employment or production shall occur during the life of this agreement. To this end the Union and the Publishers commit themselves to the orderly settlement of disputes as provided herein. However,

Appendix B

Order and Opinion of the District Court (Judge Bonsal)

New York Typographical Union No. 6 reserves to itself the right to direct its members to support a strike of this Union or of New York Mailers' Union No. 6, I. T. U., against any Publisher or Publishers signatory hereto which strike has been authorized under the laws of the I. T. U. Should such support or should unauthorized work stoppages by members of Typographical Union No. 6 result in substantial curtailment of composing room operations, the Publisher or Publishers thereby affected reserve the right to be relieved of the prohibition against the use of substitute processes or operations as provided in the jurisdictional section hereof during the period in which such support is granted or such substantial curtailment of operations continues. Upon resumption of normal operations, use of substitute processes or operations shall be discontinued. The Union agrees that it will not support a strike or work stoppage under any other circumstances."

Paragraph 85 of the underlying agreement is titled "Grievance Committee," and in part provides:

"Any controversy (except as provided otherwise herein) arising under this contract between a signatory Publisher and the Union shall be submitted to the President of the Union or his representatives, and the Publisher, or his representatives, for conciliation.

"Pending final settlement, conditions prevailing prior to the dispute shall be maintained.

Appendix B

Order and Opinion of the District Court
(Judge Bonsal)

> "If conciliation fails, then the dispute shall be referred to a board composed of two representatives of the Union and two representatives of the Publishers."

The Plaintiff and the Union added to the adopted underlying agreement the following provision:

> "It is mutually agreed by the parties hereto that The Morning Telegraph shall be bound by decisions which involve controversies arising out of the above-mentioned contract, and determined by the principal parties to that contract through the methods and agencies provided in Section 85 (Grievance Committee) therein.
>
> "However, should there arise any controversy, as between the parties to this agreement, which has not been previously determined by the Long Island Daily Press Publishing Company, Inc., The New York News, Inc., The New York Times Company and the New York Post Corporation, through their agent, The Publishers Association of New York City and New York Typographical Union No. 6, an appeal may be made to the Executive Council of the International Typographical Union."

Paragraph 4 of the collective bargaining agreement commits the parties to following the grievance settlement procedures of paragraph 85 in disputes which interrupt normal employment or production. Paragraph 85 provides for conciliation and if that fails, arbitration. While the latter part of paragraph 4 and the provision which the

Appendix B

Order and Opinion of the District Court
(Judge Bonsal)

Union and the plaintiff added to the underlying agreement exempt certain controversies from paragraph 85 procedures, it appears that a dispute, short of a strike, which interrupts normal production must be resolved pursuant to paragraph 85 procedures.

The defendants argue that since the nature of the grievance has not been stated, this court cannot determine if the Union is contractually bound to arbitrate. If the court were to follow defendants' reasoning, a union could engage in strikes or slowdowns and avoid its obligations under the collective bargaining agreement by failing to state the nature of its grievance. Therefore, if the temporary restraining order is to be vacated, the Union must state the nature of the grievance which caused the slowdown and why it is outside the scope of the arbitration clause of the collective bargaining agreements.

Defendants' motion to vacate the temporary restraining order entered in the New York Supreme Court is denied without prejudice to renewal if the Union states the nature of the grievance which caused the slowdown.

It is so ordered.

Dated: New York, N. Y.
March 23, 1971.

DUDLEY B. BONSAL
U. S. D. J.

APPENDIX C

Order and Opinion of the District Court (Justice Metzner)

The Morning Telegraph v. *Powers, 71 Civ. 949*

This is a motion to vacate an ex parte temporary restraining order which had been issued on March 1, 1971 by Justice Tyler of the Supreme Court of the State of New York for the purpose of enjoining an alleged concerted slowdown by the members of the defendant union.

On March 3, 1971 the defendants removed this action to this court and filed a motion to dissolve the temporary restraining order pursuant to Fed. R. Civ. P. 65(b). They alleged that this controversy involves a "labor dispute" with respect to which an ex parte restraining order may not issue under the Norris-LaGuardia Act, 29 U. S. C. § 104. The motion to dissolve was heard by Judge Bonsal on March 9, 1971 and denied in a memorandum filed March 23, 1971.

Defendants again move to vacate the temporary restraining order on the grounds that removal to this court imposed a 10-day limitation on the restraining order which was never extended and therefore should have expired no later than March 13, 1971.

Plaintiff's motion is without merit in that 28 U. S. C. § 1450 provides:

> "All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."

Judge Bonsal's refusal to dissolve the restraining order results in the issuance of a similar order by this court. *General Elec. Co.* v. *Local 191,* 413 F. 2d 964, 966 (5th Cir. 1969), *judgment vacated on other grounds,* 398 U. S. 436 (1970).

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Order and Opinion of the District Court
(Justice Metzner)

Also to be considered is the fact that the motion made before Judge Bonsal was made by defendants with opportunity for argument and adequate time to submit memoranda in support of their position. The requirements of Rule 65(b) have been met and there is no 10-day limitation on the present order.

Motion to vacate is denied. So ordered.

Dated: New York, N. Y.
April 17, 1971

CHARLES M. METZNER
U. S. D. J.

APPENDIX D:

Order and Opinion of the District Court (Judge Motley)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE MORNING TELEGRAPH, a Division of TRIANGLE PUBLICATIONS, INC.,
Plaintiff,
—*against*—
BERTRAM A. POWERS, Individually and as President, et al.,
Defendants.

Index No. 71 Civ. 949

Motion to vacate order entered by Judge Bonsal is denied on the ground that defendants have appealed therefrom and that appeal is pending.

SO ORDERED.

Dated: New York, N. Y.
April 27, 1971

CONSTANCE BAKER MOTLEY
U.S.D.J.

APPENDIX E

Order and Opinion of the United States Court of Appeals for the Second Circuit Reversing the Orders of Judges Bonsal and Metzner and Affirming the Order of Judge Motley

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1043-4-5—September Term 1970

Argued June 10, 1971 Decided October 13, 1970

Docket No. 71-1494, 71-1495, 71-1496

THE MORNING TELEGRAPH, a Division of Triangle Publications, Inc.,

Plaintiff-Appellee,

v.

BERTRAM A. POWERS, individually and as President, THOMAS W. KOPEC, individually and as Secretary Treasurer, DAVID CROCKETT, individually and as Vice President, of New York Typographical Union No. 6, International Typographical Union, an unincorporated voluntary association and "JOHN DOE and RICHARD ROE" and all other persons employed by the Plaintiff who are members of New York Typographical Union No 6, International Typographical Union, and the New York Typographical Union No. 6, International Typographical Union,

Defendants-Appellants.

Before HAYS, MANSFIELD and OAKES, Circuit Judges.

Consolidated appeals from three separate orders of the United States District Court for the Southern District of New York, Dudley B. Bonsal, Charles M. Metzner and

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Constance Baker Motley, *Judges*, denying appellants' motions to dissolve a temporary restraining order originally issued by the New York State Supreme Court against a work slowdown in the composing room of the Morning Telegraph.

Orders of Judges Bonsal and Metzner reversed. Judge Motley's order affirmed.

John J. Sheehan, New York, New York, for Defendants-Appellants.

Aaron M. Fine (Royall, Koegel & Wells), New York, New York (Richard N. Winfield of counsel), for Plaintiff-Appellee.

OAKES, *Circuit Judge*:

The parties to this appeal have come down the now-familiar path which winds between state and federal labor law, with management trying to bypass the anti-injunction provisions of the Norris-LaGuardia Act, 29 U. S. C. § 107, and the union sidestepping the doctrine of *Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962), and *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), that Section 301(a) of the Labor Management Relations Act of 1947, 29 U. S. C. § 185(a), does not deprive the state courts of jurisdiction, even though the state court may be enforcing rights created by federal law. The quarrel here is whether, with *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962), overruled and out of management's way, *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S.

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235 (1970), permitting a strike to be enjoined when the labor-management contract contains a no-strike and a binding arbitration clause, presents an impassable roadblock to the union.

On March 1, 1971, the Morning Telegraph obtained an *ex parte* temporary restraining order from the Supreme Court of the State of New York, enjoining the defendant New York Typographical Union No. 6 ("Union") from engaging in a work slowdown in the composing room of the Morning Telegraph at its offices in New York City. The restraint was to continue in effect until a hearing scheduled for March 3, 1971, but was extended automatically by 28 U. S. C. § 1450[1] when removed by the Union to the federal district court under 28 U. S. C. § 1441 and *Avco Corp.* v. *Aero Lodge 735*, 390 U. S. 557 (1968), permitting removal to federal court of a § 301(n) suit initially brought in state court.

Judge Bonsal of the Southern District of New York heard the Union's first motion to vacate the temporary restraining order on March 9, 1971. By order dated March 23, 1971, he denied the Union's motion on the authority of *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235 (1970), finding that the collective bargaining agreement between the parties contained a no-work-stoppage clause and a corresponding provision for the settlement of grievances through arbitration. Judge Bonsal granted the Union leave to renew the motion to dissolve if and when it saw fit to state the nature of the grievance which precipitated the work slowdown. Rather than take up Judge Bonsal on his invitation to specify the grievance,

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however, the Union renewed its motion to dissolve the restraining order, arguing, this time before Judge Metzner, that no hearing on preliminary injunctive relief had been held within the ten-day limit prescribed by Rule 65(d), Fed. R. Civ. P., and that the temporary restraining order therefore had necessarily expired. Judge Metzner ruled that the hearing on March 9, 1971, had satisfied the requirements of Rule 65(b), and that Judge Bonsal's order of March 23, 1971, was in effect a renewed grant of preliminary injunctive relief with no ten-day limitation.

The Union subsequently appealed both the order of Judge Bonsal and that of Judge Metzner, and filed a third motion to vacate the restraining order, which was heard by Judge Motley on April 27, 1971. Judge Motley found the district court without jurisdiction while the two appeals were pending, and denied the Union's motion from the bench. The Union then appealed Judge Motley's ruling. The three appeals have been consolidated here.

At the outset, we must decide whether we have jurisdiction under 28 U. S. C. § 1292 to review the orders of Judges Bonsal, Metzner and Motley. We start, of course, from the premise that an appeal will lie from the grant or denial of a preliminary injunction but not from the grant or denial of a temporary restraining order. *Grant* v. *United States*, 282 F. 2d 165 (2d Cir. 1960). The difficulty arises in characterizing a given order.

Neither Judge Bonsal nor Judge Metzner characterized his order as a preliminary injunction, but "in applying this distinction [between a temporary restraining order and a preliminary injunction] the label put on the order by the trial court is not decisive." Wright, Federal Courts 459

(2d ed. 1970), quoted with approval in *Belknap* v. *Leary*, 427 F. 2d 496, 498 (2d Cir. 1970). Here, the practical effect of the refusal to dissolve the temporary restraining order was the equivalent of a grant of preliminary injunctive relief. *Peabody Coal Co.* v. *Barnes*, 308 F. Supp. 902 (E. D. Mo. 1969).

The primary distinguishing characteristics of a temporary restraining order, under the Federal Rules, are its availability as an *ex parte* remedy, and its propensity to self-destruct after twenty days, at the outside. A preliminary injunction, on the other hand, has no such time limit, as it is by force of law granted only after both sides have been heard. The Union was heard on the propriety of preliminary relief in this case not once but three different times. And Judge Metzner specifically stated that he was eliminating any time limit from the restraint. We will therefore treat Judge Metzner's order as a preliminary injunction. Judge Motley's order thus stands as a refusal to dissolve an injunction and is likewise appealable under 28 U. S. C. § 1292(a), but as we hold that Judge Metzner's order was appealable, the question is moot in a sense, for Judge Motley was correct that she had no jurisdiction to consider an order which had already been appealed. *O'Brien* v. *Avco Corp.*, 309 F. Supp. 703, 705 (S. D. N. Y.), *rev'd on other grounds*, 425 F. 2d 1030 (2d Cir. 1969).

The Union's initial refusal to state its grievance, and its subsequent oblique references to employee representation in the Morning Telegraph's Hightstown, New Jersey, plant, have made the record in this case something less than illuminating, and the disposition, at either the trial or appellate level, something less than facile.

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The affidavit of Bertram Powers, president of the Union, not filed until after Judges Bonsal and Metzner had issued their rulings, states that "the dispute arose out of the issue of representation of plaintiff's *production* employees employed at its Hightstown, New Jersey plant" (original emphasis), and that the Union had been granted jurisdiction over "production work" at Hightstown by the Executive Council of the I. T. U. But we are nowhere told the difference, if any, between production work and other composing room work, or whether "production work" is composing room work at all. Elsewhere in the record it appears that Triangle Publications publishes, or plans to publish in the near future, the Daily Racing Form, the Eastern Edition of which will apparently be printed in Hightstown, New Jersey. We are not told whether Triangle Publications does any work on the Morning Telegraph in Hightstown now, or if and when it plans to in the future. Nor are we told anything about the employees who now work in Hightstown and are apparently represented by the Trenton Typographical Union. We do not know, for instance, whether they are production workers, and we have no indication whether they work on the Morning Telegraph or the Daily Racing Form. We are left, then, with little else than the contract itself.

The Union's contract with Triangle Publications is written in the form of an agreement supplemental to an earlier contract between the same Union and the Publishers Association of New York City, an organization representing the Long Island Press Company, the New York News, the New York Post Corporation and the New York Times Company. The earlier agreement (hereinafter the "underlying contract") was to be in effect for three years, from

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March 31, 1970, to March 30, 1973. The portion of the underlying contract dealing with strikes and work stoppages is the following:

JOINT COMMITMENT

4. It is the intention and the desire of the parties hereto that no strike or other interruption of normal employment or production shall occur during the life of this agreement. To this end the Union and the Publishers commit themselves to the orderly settlement of disputes as provided herein. However, New York Typographical Union No. 6 reserves to itself the right to direct its members to support a strike of this Union or of New York Mailers' Union No. 6, I.T.U., against any Publisher or Publishers signatory hereto which strike has been authorized under the laws of the I.T.U. Should such support of should unauthorized work stoppages by members of Typographical Union No. 6 result in substantial curtailment of composing room operations, the Publisher or Publishers thereby affected reserve the right to be relieved of the prohibition against the use of substitute processes or operations as provided in the jurisdictional section hereof during the period in which such support is granted or such substantial curtailment of operations continues. Upon resumption of normal operations, use of substitute processes or operations shall be discontinued. The Union agrees that it will not support a strike or work stoppage under any other circumstances.

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Procedures are also established for the arbitration of "grievances."[2]

The Supplemental Agreement, executed by the Union and the Morning Telegraph on July 31, 1970, effective March 31, contains the following material modifications of the underlying agreement:

> The parties hereto shall be bound by and shall adhere to the terms and conditions in the collective bargaining agreement entered into between the Party of the Second Part and The Long Island Daily Press Publishing Company, Inc., The New York News, Inc., The New York Times Company and the New York Post Corporation, through their agent, The Publishers' Association of New York City, covering the period March 31, 1970 to March 30, 1973, *with the following exceptions*:
>
> Discharges shall be processed in accordance with Section 86 (Appeal from Discharge)[3] of the contract referred to above, except that the procedures shall apply as between the Union and the particular employer.
>
> It is mutually agreed by the parties hereto that The Morning Telegraph shall be bound by decisions which involve controversies arising out of the above-mentioned contract, and determined by the principal parties to that contract through the methods and agencies provided in Section 85 (Grievance Committee) therein.
>
> However, *should there arise any controversy, as between the parties to this agreement*, which has not been previously determined by the Long Island Daily Press Publishing Company, Inc., The New York News, Inc., The New York Times Company and The New

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> York Post Corporation, through their agent, The Publishers' Association of New York City and New York Typographical Union No. 6, an appeal may be made to the Executive Council of the International Typographical Union. [Emphasis added.]

The present dispute involving a work slowdown in the Morning Telegraph composing room in New York is clearly not arbitrable under the terms of the contract. We agree with the Union's contention that had the parties intended Section 85 (Grievance Committee) of the underlying agreement to govern such a dispute between them, they might have easily so provided, as they did with Section 86 (Discharges),[4] instead of establishing a different procedure for "any controversy . . . between the parties to this agreement. . . ."

The Morning Telegraph argues that it has been willing, at all times, to submit a valid dispute to arbitration, but that the Union's initial failure to specify the nature of the grievance made arbitration impossible. The Company also argues that if the Union is disgruntled over representation in the Telegraph's Hightstown, New Jersey, plant, its appeal must be to the National Labor Relations Board, as the dispute is entirely outside this contract. The Telegraph points out that it has an existing contract with the Trenton Typographers Union at its Hightstown plant, and that the claimed decision of the Executive Council of the ITU can be of no moment to the Telegraph, which had no notice of or chance to be heard on that appeal.

Indeed, the Morning Telegraph has great difficulty believing that it could have signed a contract with a pro-

vision for the resolution of contract disputes only by (optional) appeal to the Executive Council of the ITU. But there the provision is—"any controversy" between the Morning Telegraph and the Union not previously determined by The Publishers' Association and New York Typographical Union No. 6 is resolved by appeal to the Executive Council of the ITU.

With the perhaps superfluous observation that the supplemental contract appears to hold the Union bound to "industry arbitration" only, we find it unnecessary to decide precisely which disputes might or might not be subject to compulsory arbitration under this contract, as the instant dispute apparently is not, whether it is undefined, or defined as "jurisdictional" or "representational."

It is true that in *Carey* v. *Westinghouse Corp.*, 375 U. S. 261 (1964), the Supreme Court, through Mr. Justice Douglas, held that a "jurisdictional" or work assignment dispute, short of a strike, as well as a "representational" dispute, may be an arbitrable grievance under a labor contract. *Carey* in effect defined an area of overlapping jurisdiction between the Board and the arbitrator, filling a statutory gap to avoid "forcing [a work assignment] controversy into the strike stage before a remedy before the Board is available." 375 U. S. at 264.[5]

But while *Carey* may be the starting gate, when the controversy is labeled as "jurisdictional" or "representational," it is not the finish line for this case, for *Carey* dealt with a contract containing a much broader arbitration clause than that here.

Moreover, although neither party to this dispute has mentioned Section 3 (Jurisdiction) of the underlying con-

tract, that clause would seem on its face to remove a work assignment dispute from the grievance arbitration procedure the contract provides. Section 3 says that

> It is agreed that this contract determines the agreement of the parties covering the jurisdiction over work processes specified herein. Any dispute concerning such jurisdiction shall not be subject to arbitration.
>
> The conditions prevailing prior to the incident, action or proposed change resulting in any difference between the parties as to any jurisdictional question shall be maintained until the dispute is resolved as herein provided.
>
> Any controversy over jurisdiction shall be resolved by discussion between the parties. If such discussion fails to resolve the issue appeal may be made to the Executive Council of the International Typographical Union. In the event either party is unwilling or unable to resolve the controversy in the manner herein above specified, then either party may refer it for recommendation only to the Joint Supervisory Commission provided for in Section 6 hereof.

Nothing in the supplemental agreement overrides Section 3 of the underlying contract. If, then, the dispute were over work assignments, it clearly would not be subject to arbitration under this contract.

The orders of Judges Bonsal and Metzner are reversed, the injunctive relief vacated, and the complaint dismissed. Judge Motley's order is affirmed.

Appendix B

Order and Opinion of the United States Court of Appeals for the Second Circuit Reversing the Orders of Judges Bonsal and Metzner and Affirming the Order of Judge Motley

1. 28 U. S. C. § 1450 provides:

> Whenever any action is removed from a State court to a district court of the United States . . .
>
> [a]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.

2. GRIEVANCE COMMITTEE

> 85. Any controversy (except as provided otherwise herein) arising under this contract between a signatory Publisher and the Union shall be submitted to the President of the Union or his representatives, and the Publisher, or his representatives, for conciliation.
>
> Pending final settlement, conditions prevailing prior to the dispute shall be maintained.
>
> If conciliation fails, then the dispute shall be referred to a board composed of two representatives of the Union and two representatives of the Publishers.
>
> This board shall meet within five days from the date a dispute was referred to it and shall endeavor to settle the dispute, provided, that at the request of either party, this board shall meet only for the purpose of selecting a fifth and impartial member, who is to act as chairman. If the board is unable to agree on the fifth member, he shall be designated according to the rules of the American Arbitration Association.
>
> As thus constituted, the five-man board shall meet within ten days from the date the dispute was referred to it and shall proceed promptly to settle the controversy.

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The decision of the majority of this board shall be final and binding; provided, any decision on any issue shall not be retroactive to a date earlier than the date on which the issue is raised; provided, further, this board shall have jurisdiction only over controversies properly and specifically referred to it, and its decisions cannot abridge the fundamental rights reserved by and to the signatory Publisher and the Union.

It is agreed that local Union Laws not affecting wages, hours or working conditions and the General Laws of the International Typographical Union at the time of the signing of the contract, shall not be subject to arbitration.

Nothing herein obligates either party to arbitrate differences respecting a succeeding contract.

3. APPEAL FROM DISCHARGE

86 When an employee is discharged for any of the reasons set forth in Section 5 of this Contract and such action is contested by such employee or in his behalf by any party to this Contract, the contention shall be referred directly to the board set up under Section 85 of this agreement and processed as prevailed for the settlement of disputes, except that the sentence "Pending final settlement, conditions prevailing prior to the dispute shall be maintained" shall not apply in discharge cases.

The majority of the board, in rendering a decision, shall take into consideration all the facts and conditions surrounding the discharge.

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Where discharges are made for reasons other than stated in Section 5 (Employment, Discharge, Priority) and the aggrieved employee appeals, on his motion the procedure shall be in accordance with the I.T.U. Law in force at date of signing Contract. An appeal from discharge must be filed by the employee or by the Union with the Publishers' Association within 30 days of the date of discharge.

4. The Union buttresses this argument with reference to a management suggestion, during negotiations, that Section 85 be included in the contract. The suggestion was not adopted.

5. Once a union has struck over a work assignment dispute, of course, an unfair labor practice has occurred, 29 U. S. C. § 158(b)(4)(D), and the Board itself may seek temporary injunctive relief in a federal district court, 29 U. S. C. § 160(k). If the dispute is representational, on the other hand, resort to the "therapy of arbitration," 375 U. S. at 272, in the first instance may obviate the need for an appeal to the Board, although the Board, if appealed to, would have the final say. While it is possible that management may at the least be liable in damages for bargaining with the wrong union, even if done in good faith reliance on the arbitrator's award, *Carey v. Westinghouse Corp.*, 375 U. S. at 275 (dissenting opinion), an available remedy would appear to be a petition for clarification of the bargaining unit under § 9(c) of the Act. 29 U. S. C. § 159(c).

APPENDIX F

Order and Opinion of the United States Court of Appeals for the Second Circuit Denying Petitioner's Motion for Rehearing

71-1494, 71-1495-96

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

THE MORNING TELEGRAPH, a Division of TRIANGLE PUBLICATIONS, INC.,

Plaintiff-Appellee,

v.

BERTRAM A. POWERS, individually and as President, THOMAS W. KOPEC, individually and as Secretary Treasurer, DAVID CROCKETT, individually and as Vice President of New York Typographical Union No. 6, International Typographical Union, an unincorporated voluntary association and "JOHN DOE" and "RICHARD ROE" and all other persons employed by the plaintiff who are members of New York Typographical Union No. 6, International Typographical Union and the New York Typographical Union No. 6, International Typographical Union,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that the prior order, dated October 13, 1971, be amended by inserting the following in lieu of the final paragraph of said prior order:

Appendix F

Order and Opinion of the United States Court of Appeals for the Second Circuit Denying Petitioner's Motion for Rehearing

"The orders of Judges Bonsal and Metzner are reversed, the injunctive relief vacated, and the cause remanded. Judge Motley's order is affirmed."

And it is further

Ordered that said petition in all other respects be and it hereby is denied.

PAUL R. HAYS
WALTER R. MANSFIELD
JAMES L. OAKES

November 5, 1971

AFFIDAVIT OF SERVICE

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOSEPH SESSA, being duly sworn, deposes and says that he served the foregoing Petition and Appendix upon the attorney for respondent herein, on December 10th, 1971 by mailing three true and correct copies thereof, postage prepaid to John J. Sheehan, Attorney for Respondent, 51 Chambers Street, New York, New York.

/s/ JOSEPH SESSA
Joseph Sessa

Sworn to before me this
10th day of December, 1971.

.....
Notary Public

JAMES M. KESTENBAUM
NOTARY PUBLIC, State of New York
No. 30-2102225
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1973